

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v

TRACEY BURNSTEIN and MARK
BURNSTEIN,

Defendants-Appellants,

and

BRIAN CONN and ELLEN CONN,

Defendants.

UNPUBLISHED

June 2, 2005

No. 260401

Oakland Circuit Court

LC No. 2004-055561-CK

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendants Tracey and Mark Burnstein (hereinafter “defendants”) appeal as of right from the trial court’s order granting plaintiff Allstate Insurance Company summary disposition under MCR 2.116(C)(10) in this declaratory judgment action. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

In an underlying action, defendants were sued in Texas by Brian and Ellen Conn for intentional infliction of emotional distress and libel. Brian Conn is the brother of defendant Tracey Burnstein. The Conns brought the underlying action after defendants sent them and other family members a series of email messages, with attachments, that contained personal attacks directed toward Brian Conn and revealed details of alleged criminal activity by Brian Conn.

Plaintiff subsequently brought this declaratory judgment action, seeking a declaration that it was not required to defend or indemnify defendants under various homeowners’ and umbrella insurance policies it had issued to defendants. Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that the injuries alleged by the Conns did not result from an “occurrence” as defined in the policies and alternatively fell within an intentional-acts exclusion. The trial court concluded that defendants’ conduct was intentional and, therefore, the underlying claims did not qualify as an occurrence under the policies.

This Court reviews a trial court's decision with regard to a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek, supra* at 337. Summary disposition should be granted if, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). An issue involving the proper interpretation of an insurance contract is also reviewed de novo. *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 288; 683 NW2d 656 (2004) ("*McCarn II*").

Defendants had three homeowners' insurance policies and an umbrella policy in effect during the period the emails were sent to the Conns. Each of the policies provide coverage for bodily injury or property damage due to or arising from an occurrence.

In each of the homeowners' policies, the term "occurrence" is defined as follows:

9. "Occurrence" -- means an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage.

The umbrella policy defines the term "occurrence" as follows:

7. "Occurrence" means an accident or a continuous exposure to conditions. An occurrence includes personal injury and property damage caused by an insured while trying to protect persons or property from personal injury or property damage.

In *Allstate Ins Co v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002) ("*McCarn I*"), our Supreme Court considered a similar definition of "occurrence" in a homeowners' policy. In *McCarn I, supra* at 281-282, the term "accident" was used to define an "occurrence," but, as here, "accident" was not defined in the policy. The Court noted that determining the meaning of "accident" is more problematic when the insured's actions are intentional. *Id.* The Court explained that an accident can result from an intentional act if the insured did not reasonably expect the consequences:

What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured.

As to the perspective from which the analysis should be made, the question is not whether a *reasonable person* would have expected the consequences, but whether the *insured* reasonably should have expected the consequences. Accordingly, an objective foreseeability test should not be used in the present context. Rather, the analysis must be that, to avoid coverage, the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured.

The policy language dictates whether a subjective or objective standard is to be used. However, the policy language here does not indicate whether a subjective or objective standard is to be used. Because "the definition of accident should be framed from the standpoint of the insured . . .," [*Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999)], and because, where there is doubt, the policy should be construed in favor of the insured, *id.* at 111, we conclude that a subjective standard should be used here. Further, in *Masters*, this Court, faced with similar policy language, concluded that there is no coverage where the insured intended his action, and the consequences of this intended action "either were intended *by the insured* or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions." *Id.* at 115. [*McCarn I, supra* at 282-284 (footnote omitted; emphases in original).]

After reviewing the allegations against defendants in the underlying action, we agree with the trial court that defendants' conduct cannot be construed as an accident and, therefore, did not involve an occurrence as defined in the policies. Thus, the trial court properly concluded that coverage was not available under the policies.

There is no dispute that defendants acted intentionally when sending the emails to the Conns and their relatives. The principal issue is whether the consequences of their acts were reasonably expected by defendants. As discussed in *McCarn I, supra* at 282-284, this Court must apply a subjective standard and determine if defendants reasonably should have expected the consequences of their actions.

Although defendants submitted affidavits wherein they denied sending some of the emails the Conns alleged and also denied intending to cause any harm to the Conns by sending out the emails, both defendants admitted they sent out several of the emails in question because they were upset with Brian Conn's treatment of his father and his daughter. The emails condemned Brian Conn for his behavior, and defendants admitted notifying relatives about past sexual abuse allegations in a multi-count indictment filed against Brian Conn, although he had pleaded nolo contendere to only a single count of misdemeanor assault and the remaining charges were dismissed. Defendants reasonably should have expected that the emails would subject Brian Conn to ridicule among those who knew him. This case is distinguishable from *McCarn I, supra*, because defendants' intended acts created a direct risk of harm from which they reasonably should have expected the consequences. See *Nabozny v Burkhardt*, 461 Mich 471, 480-481; 606 NW2d 639 (2000) (holding that the defendant should have expected the consequences – a broken ankle for the plaintiff – when he intentionally tripped the plaintiff during a fight). Therefore, this case does not involve an accident or an occurrence under the policies. The trial court did not err in granting plaintiff summary disposition under MCR 2.116(C)(10).

We also conclude that coverage was barred by the intentional-acts exclusions in the policies. Although the trial court did not address this issue, we may address it on appeal to the extent that it involves a question of law and all the necessary facts have been presented. *Sutton v City of Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002).

In *McCarn II*, *supra* at 289-290, the Court interpreted an intentional-acts exclusion that is nearly identical to the exclusions at issue in this case:

In this case, we deal with other policy language, which is commonly described as the criminal-acts exclusion. It states:

"We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:

a) such insured person lacks the mental capacity to govern his or her conduct;

b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or

c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime."

This language directs us to apply a two-pronged test. There is no insurance coverage if, first, the insured acted either intentionally or criminally, and second, the resulting injuries were the reasonably expected result of an insured's intentional or criminal act. We agree with the Court of Appeals that the first prong of this test--that there was an intentional or criminal act--has been met.

Answering the second prong of the test, whether the resulting injury was the reasonably expected result of this criminal act, requires this Court to engage in an objective inquiry. *Allstate Ins Co v. Freeman*, 432 Mich 656, 688; 443 NW2d 734 (1989) (opinion by Riley, J.). That is, we are to determine whether a reasonable person, possessed of the totality of the facts possessed by Robert, would have expected the resulting injury. This requirement to base the objective reasonability test on all the facts has been discussed by scholars of tort law: "The conduct of the reasonable person will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account" Prosser & Keeton, *Torts* (5th ed), § 32, at 175. We have held similarly in our cases, "[T]he reasonable person standard examines the totality of the circumstances to ensure a fair result." *Radtko v Everett*, 442 Mich 368, 391; 501 NW2d 155 (1993).

As discussed previously, there is no material dispute that defendants intentionally sent the emails in question to the Conns and their relatives. Further, a person who accuses another of wrongdoing, particularly criminal behavior, should reasonably expect such conduct to cause emotional harm and injury to that person's reputation. We therefore conclude that the intentional-acts exclusions in plaintiff's policies apply and independently support summary disposition for plaintiff.

We reject defendants' argument that the intentional-acts exclusion should not apply because, under Texas law, they may be liable for intentional infliction of emotional distress if their behavior was merely reckless, not intentional, and because an action for libel can be based on ordinary negligence. The question of coverage must be decided with regard to the factual allegations in the underlying complaint, the language found in the policies, and defendants' conduct, not necessarily the legal theories pleaded by the Conns in their complaint. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636-637; 687 NW2d 300 (2004).

"[A]n insurer's duty to defend . . . does not depend solely upon the terminology used in a plaintiff's pleadings. Rather, 'it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists. . . . [S]o must the allegations be examined to determine the substance, as opposed to the mere form, of the complaint.'" [*Michigan Educational Employees Mut Ins Co v Karr*, 228 Mich App 111, 113; 576 NW2d 728 (1998), quoting *Allstate Ins Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989), quoting *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984).]

See also *Fitch v State Farm Fire & Casualty Co*, 211 Mich App 468, 471; 536 NW2d 273 (1995) ("The duty to defend and indemnify is not based solely on the terminology used in the pleadings in the underlying action. The court must focus also on the cause of the injury to determine whether coverage exists."). It is apparent here that defendants' conduct, as alleged in the Conns' complaint, did not involve an occurrence as defined in plaintiff's insurance policies and that the intentional-acts exclusions also apply to bar coverage under the policies.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter